LIBRARY
SUPREME COURT U.S.

Office-Supreme Court, U. S.
FILED
AUG 8 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 172.

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents*.

BRIEF FOR RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. etc. IN OPPOSITION.

ROGER J. WHITEFORD
JOHN J. WILSON

Attorneys for Respondent, Societe Internationale Pour Participations Industrielles et Commerciales S.A. etc.

Address: 815 15th St., N. W.
Washington, D. C.

Of Counsel

SUBJECT INDEX.

	Page
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	6
Introductory	6
Petitioners Have No Basis for Intervention	7
Petitioners' Intervention Is Only Ostensibly and Not Truly Derivative, Whether In a Typical or an Exceptional Sense	12
Petitioners Cannot Maintain a Class Action Here	14
The New York Proceeding Affords Petitioners Full Opportunity to Test Out Their Theory Under the Uebersee Case	16
Petitioners Cannot Intervene to Prevent a Settlement Between Respondents	18
CONCLUSION	20

TABLE OF CASES.

Atwood v. *National Bank of Lima*, (C. C. A. 6th 1940), 115 F. 2d 861)	16
Brotherhood of Locomotive Firemen, etc. v. *Graham*, U. S. App. D. C. 67, 72, 175 F. 2d 802	14
Clark v. *Uebersee Finanz Korporation*, 332 U. S. 440	2
Eisner v. *Macomber*, 252 U. S. 189, 208	11
First National Bank v. *Maine*, 284 U. S. 312, 329-330	11
Cross v. *Mo. & Ark. Rwy. Co.*, 74 F. Supp. 242, 249 (W. D. Ark. 1947)	10
Hansberry v. *Lee*, 311 U. S. 32, 45	15
In Re Bender Body Co., 6 F. R. S. 379 (D. C. N. D. Ohio, 1942)	11
Knowles v. *War Damage Corporation*, 83 U. S. App. D. C. 388, 171 F. 2d 15, Cert. denied 336 U. S. 914	16
Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502	3, 11, 12
Mitchell v. *Wright*, 9 F. R. S. 23a.11, Case 2, 62 F. Supp. 580, (D. C. M. D. Ala. 1945)	15

Page

Park & Tilford, Inc. v. *Schulte*, 160 F. 2d 984 (2nd Cir.) 13
Pyle-National Co. v. *Amos*; 172 F. 2d 428 (7th Cir.) . . 13, 19
Radford Iron Co. v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4, 1933) 10
Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69, 81 11
Speed v. *Transamerica Corporation*, 5 F. R. D. 56, 9 F. R. S. 23a.33, Case 2 (D. C. D. Del. 1945) 15
Standard Oil Co. v. *Clark*, 163 F. 2d 917 (C. C. A. 2, 1947) 11
United States v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del. 1939) 10, 11
Weeks v. *Bareco Oil Co.*, (C. C. A. 7th 1941) 125 F. 2d 84 15

TREATISE, ETC.

120 A. L. R. 238 13
Moore's Federal Practice (Second Edition) Vol. 4, paragraph 24.09 11
Moore's Federal Practice (Second Edition) Vol. 3, page 3415 14

RULES OF COURT.

FRCP 17(a) 7
FRCP 24(a)(2) 7
FRCP 24(a)(3) 7

IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 172.

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC.

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents.*

BRIEF FOR RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. etc. IN OPPOSITION.

QUESTION PRESENTED.

Whether this Court should review a decision of the Court of Appeals denying, because of the inapplicability of Rule 24(a) (2) and (3) of the Federal Rules of Civil Procedure, leave to two stockholders of a Swiss corporation to intervene under that Rule, derivatively, individually and for a non-existent class, in the corporation's statutory action

against the Alien Property Custodian pending in the District of Columbia and filed under Section 9(a) of the Trading with the Enemy Act to recover its vested corporate property upon the ground that it is neither enemy nor enemy-tainted, where the applicants claim that certain hypothetical phrases in the opinion of this Court in *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, permit them to recover *individually*, if they are "non-enemy," a portion of the vested corporate property commensurate with their stock interest in the corporation, and also to block a compromise between the corporation and the United States which does not allow for such alleged right;—that is to say, whether this Court should review the decision in question, in view of the fact that the Court of Appeals is clearly correct according to all standards, and, in any event, in view of the fact that these two stockholders are prosecuting their own action in New York under Section 9(a) against the Alien Property Custodian in which they assert the same claim in their individual behalf and squarely present there the "issue" which they draw, *albeit incorrectly*, from the *Uebersee* case, not interlaced with other inapplicable theories such as class actions and stockholders' derivative procedures, and by which New York action they protect themselves, if they have individual rights, against the possibility of a compromise impairing such a right.

STATEMENT.

At the end of this Court's opinion in the case of *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 appears the following paragraph:

> "It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally

of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification."

Petitioners, claiming to be "non-enemy" or "non-enemy-tainted" stockholders of the respondent-corporation, and further claiming to represent a class of such stockholders, assert that, by virtue of the foregoing language of this Court, they can recover a portion of the vested property of this respondent equal to their stock interest, even if the respondent-corporation may be denied recovery of *all* such property.

Petitioners seek to intervene in the suit which this respondent is maintaining in the District Court under Section 9(a) of the Trading with the Enemy Act to recover its vested property, their theories of intervention being as follows:

(1) That under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and under the case of *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, they may intervene "derivatively" to assert their alleged proportional claim;

(2) That under Rule 24(a)(3) they may intervene directly—that is, as individuals—to assert such claim, upon the ground that they have such an "interest" in the vested corporate property; and

(3) That there is a "class" of "non-enemy" stockholders, and petitioners represent them in the attempted intervention.

The Court of Appeals held that petitioners did not come within either clause of Rule 24(a), and affirmed the District Court's denial of intervention.

This respondent submits that the *Uebersee* case does not support petitioners' theory, but if it does, petitioners have an individual action pending in New York under Section 9(a) and therefore intervention here should not be allowed.

This respondent reads the foregoing language from the *Uebersee* case as not considering the problem of "enemy taint" from the viewpoint of the "rights" of individual stockholders of a corporation, but, instead, of dealing with the following question: where a corporation is only "tainted," instead of being enemy-owned or enemy-controlled, how *small* or how *indirect* may the "taint" be in order to permit the Custodian to retain some or all of the vested corporate property? In other words, we interpret the questions of this Court as touching upon an entirely different matter from that to which petitioners refer.

But, assuming that this respondent's idea is erroneous, and that this Court had in mind the protection of so-called "innocent" stockholders, we submit that, for two reasons, the instant case is not the one in which review of the question should be had by this Court. One reason is that petitioners' "individual" action in New York squarely presents their point of view; and the other is that *on the record* which petitioners present to this Court, there is no basis to invoke what they call the "Uebersee issue."

As to the former of these two reasons, the Court's attention is called to the following facts:

On March 9, 1950, five days before the original motion was filed in the trial court for leave to intervene, these same petitioners instituted in their own individual behalf, in the United States District Court for the Southern District of New York, a civil action under Section 9(a) against the Attorney General as successor to the Alien Property Custodian, seeking a decree adjudging that they are entitled to the ownership, possession and enjoyment of their pro-

portionate share of the property and funds of this respondent seized by the Alien Property Custodian. (R. 85-88) The defendant therein moved to dismiss such action upon the ground that it failed to state a claim upon which relief could be granted. Judge Samuel Kaufman denied this motion, and the case has been calendared for trial upon the Custodian's answer.

As to the latter of the foregoing two reasons, we refer to the fact that on pages 4 and 5 of their petition, petitioners embrace and rely upon arithmetic—whether correct or not is, at this moment, unimportant—to the effect that this respondent's management—charged by the Custodian with "enemy taint"—owns or controls 39% of the voting stock and that an additional 11% were owned by German nationals. Surely, such 50% are more than "only a fractional enemy ownership" as that phrase is used in the clause: "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears." Instead, it seems that the phrase, "only a fractional enemy ownership," is in apposition to the words "negligible stock interest" appearing earlier in the same paragraph. The result is that petitioners are not presenting a case which even sympathetically involves the most favorable interpretation of the "Uebersee issue."

A word about the so-called "class action." Petitioners use the phrase "non-enemy stockholders" as descriptive of a class, just as one might describe by class "common stockholders" or "preferred stockholders." There is, of course, no such class, and if the test ever comes, each shareholder would have the burden of proving that under Section 9(a) of the Trading with the Enemy Act, he is not an enemy nor "enemy tainted." In other words, a so-called class of non-enemy stockholders could not establish their status as a unit, such as holders of common or preferred shares may do; but, instead, each shareholder would be, in effect, a separate plaintiff, in a separate Section 9(a) proceeding. Under petitioners' theory, this case would be

converted from one where the "enemy" status of this corporation is in issue, to hundreds or thousands of individual actions, in each of which the "enemy" or "enemy tainted" status of the plaintiff-stockholder would be the issue.[1]

ARGUMENT.

Introductory.

This respondent submits that a fundamental weakness of petitioners' position is that they are really asserting individual claims,—not a corporate one. Their contention—that the corporation may recover for the benefit and to the extent of the non-enemy stockholders—"covers a multitude of sins" and is quite self-serving as applied in this instance. It provides an *otherwise qualified* plaintiff under a Section 9(a) action. It *appears* to fit one or more categories of stockholders' derivative actions. And it overcomes all the difficulties, confronting other shareholders in their alleged class, which arise out of the statutory limitations relating to the filing of claims and suits.

If it should eventually be decided that "non-enemy" stockholders have proportional rights in the vested property of their corporation, such rights must be individual to the stockholders and not corporate. The assertion of such rights would be contingent upon the failure of the corporation to recover if it should be determined that it is "enemy" or "enemy-tainted." At such point the corporation would have lost all right, title and interest in the vested property. Moveover, the corporation will not acquire anything if petitioners' claim prevails.

In other words, according to petitioners, the corporation might not recover in its own right, but could recover in the right and to the proportional extent of its "non-enemy" stockholders for the sole benefit of such stockholders. It would be a sort of "use" plaintiff for them. But it is submitted that if the "non-enemy" shareholders have

[1] This respondent has approximately 3000 stockholders.

rights in the vested property, they may be enforced by direct action on their individual behalf. Anything else is sheer circuity the ultimate objective of which is to give "eligible" stockholders what they are really claiming, namely, a direct right in vested property of an "ineligible" corporation.

Rule 17(a) of the Federal Rules of Civil Procedure provides that every action shall be prosecuted in the name of the real party in interest. Surely, the real parties in interest would be the so-called "non-enemy" stockholders. The corporation would have lost its rights in the vested property and, under such circumstances, it would plainly not be an indispensable party—nor even a necessary one.[2]

I.

Petitioners Have No Basis For Intervention.

The opinion of the Court of Appeals was confined to this point.[3]

Petitioners rely upon clauses (2) and (3) of Rule 24(a) of the Federal Rules of Civil Procedure, as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof."

Petitioners wish to intervene "derivatively" under clause (2) of the Rule, and directly or "individually" under clause (3).

---

2 See petitioners' Complaint filed in New York, (R. 85-88).

3 Record, pp. 79-80.

As to Rule 24(a)(2), we submit that petitioners are not and may not be bound by a judgment in the main action. This is what the Court of Appeals held, stating:

> "If they have a right to a share of the vested property they cannot be deprived of it in a suit to which they are not parties."

This is the provision of the Rule under which intervention ordinarily is allowed to a stockholder of a corporation.[4] The reason is very simple. The right which is being asserted in such cases is a corporate right, and the stockholder seeks intervention either to assert or to support such a right. Naturally, in those circumstances, intervention is the only opportunity afforded the shareholder to litigate the point which he seeks to maintain. If he permits the chance to pass, he is thereafter estopped.

But that is not the situtation here. The main complaint seeks recovery for the corporation as a whole. Petitioners do not ask permission to support that claim. The claim which petitioners wish to assert and dispose of is not embraced within the complaint. Petitioners seek to set up another kind of claim—one which would divert recovery to themselves.

It is not a mere matter of amending the complaint so as to embrace the claim sponsored by the petitioners, even assuming for the moment that it is the assertion of a corporate claim. The entire theory of the instant action by this respondent,— in fact, the pre-requisite of Section 9(a) itself—is that the corporation is not an enemy. Petitioners would require the statement of an alleged statutory cause of action which would conflict with the statute itself; that is to say, petitioners would not permit themselves to allege that the corporation is not an enemy; they would have to say that it was—or was not—an enemy to a certain extent. Such qualification either way would destroy their proposed cause of action in view of the statute.

---

[4] See cases cited by petitioners in footnote 10 on page 14 of their petition.

We do not urge that contradictory claims may not be joined in a single complaint. What we do say is that petitioners' claim cannot be considered to be embraced within the instant complaint in a statutory action, since it would run counter to the statute.

Petitioners would not be precluded from asserting their proposed claim, should there be a judgment against the corporation, because they are asserting an individual right. Plainly this is not incorporated in the respondent's corporate cause of action. Actually, this can be best illustrated by making two comparisons, one of the instant intervention[5] with the suit which petitioners have filed in the Southern District of New York[6]; and the other, of the New York complaint with this respondent's suit here.[7]

The first comparison demonstrates that, except for the "class" nature of the proposed proceeding here, the two cases (New York action and instant intervention) are substantially the same in principle. Each seeks recovery for individuals out of the vested property.

The second comparison (New York action with this respondent's action) strikingly shows the difference between the individuals' objective and the result sought by the corporation. We submit that no one could seriously argue that a judgment in one case would be a bar to the other.

The opportunity to make these actual comparisons permits the Court to see the true picture. If petitioners have rights, they have protected them by a timely action in New York. A reading of the New York complaint shows that petitioners filed a claim with the Office of Alien Property, as required by Section 9(a) of the Trading with the Enemy Act. Their intervention papers here are silent upon this point. The reason is simple. The proposed intervention is an attempt at a class proceeding, but there

[5] See R. 47.
[6] See R. 85.
[7] See R. 1.

only three members of the class, comprised of those shareholders who have filed claims with the defendant.[8] Further claims cannot be filed, according to Section 33 of the Trading with the Enemy Act.[9] They try to overcome this fatal deficiency by parading in the name of the corporation and under the benefit of its timely filing of both claim and suit.

Obviously, petitioners realize this, and the intervention which they have devised is designed to overcome these statutory obstacles, not for themselves, but for the so-called "class" which they are trying to sponsor.

Rule 24(a)(3) is not the provision by which stockholders are permitted to intervene derivatively. It is relied upon by petitioners in this instance as the basis for asserting a direct or individual right in the corporate property.

It is well settled that in order to intervene as of right under this clause of Rule 24, the applicant must have a present actual interest in the property in issue. This is substantially what the Court of Appeals stated in rejecting the applicability of clause 3, the exact language of the Court being:

> " 'The law is well settled that one entitled to intervene as a matter of right under Rule 24(a)(3) F. R. C. P. "must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment." *Pure Oil Co.* v. *Ross*, 170 F. 2d 651 (C. C. A. 7, 1948).' "*Dowdy* v. *Hawfield*, ... U. S. App. D. C. ...., F. 2d ....; No. 104E5$ decided March 1, 1951." "'Clause (3) contemplates that the person having the right of intervention should have a legal interest in the property in the custody of the court.'" Citing *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116 (D. C., D. Dela., 1939); and comparing *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940 (C. A. 4, 1933); *Cross* v. *Missouri & A. Ry. Co.*, 74 F. Supp. 242

[8] See affidavit of Archer Henrick, Records Officer of the Office of Alien Property (R. 31).

[9] 50 U. S. C. Appendix, Section 33. See also, further discussion of this "class action" on page 14, *post*.

(D. C., W. D. Ark. 1947); and *In re Bender Body Co.*, 6 F. R. S. 379 (D. C., N. D. Ohio, 1942).[10] "Appellants have no such interest." "'The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members. *Donnell* v. *Herring-Hall Marvin Safe Co.*, 208 U. S. 267, 273.'" *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24.) If this basic principle were disregarded in connection with clause (3) the result would be that any stockholder in any corporation could insist on intervening in any suit involving a claim of the corporation to specific property."

It is submitted that the Court of Appeals is quite correct, in reliance upon an unbroken line of decisions of this Court, in holding that a stockholder has no interest in the property of his corporation. In addition to the two cases cited in the opinion, see *Eisner* v. *Macomber*, 252 U. S. 189, 208; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81; and *First National Bank* v. *Maine*, 284 U. S. 312, 329-330.

---

[10] These cases fully sustain the proposition for which they were cited by the Court of Appeals. There seems to be no doubt as to this construction of clause (3). See also Moore's Federal Practice (Second Edition) paragraph 24.09 (pp. 43-46 of Vol. 4).

In a footnote on page 12 of their petition, petitioners criticize the Court of Appeals for relying upon the *Columbia Gas* case in the Delaware District Court. The criticism is that the principle relied upon by the Court of Appeals was overruled subsequently *in the same case* by the Supreme Court *sub. nom. Missouri-Kansas Pipe Line Co.* v. *United States*. 312 U. S. 502. This respondent disagrees with any such contention. The later decision did not touch upon the proposition for which the Court of Appeals cites the District Court opinion. In the earlier case, the stockholder, as here, had sought to intervene in its (the stockholder's) own right.

Petitioners also criticize the Court of Appeals for not discussing *Standard Oil Co.* v. *Clark*, 167 F. 2d 917 (C. C. A. 2, 1947); Cert. denied 333 U. S. 873, which they cited below, and in which they argue (p. 14 of their petition), "complicated intermixtures of enemy and non-enemy ownership in vested assets were unravelled as a basis for decreeing the return of vested assets commensurate with the non-enemy ownership." Assuming this to be so, the situation and problem involved in that case were far different from the ones in the case at bar. In the *Standard Oil* case, intermixtures of enemy and non-enemy ownership were capable of separation on the basis of direct ownership by Americans and Germans, respectively; while, here, petitioners seek to have the court separate, and release to them as their own property, vested corporate assets in which they have neither a direct nor recognizable, separable interest. Obviously the case is not at all analogous to the instant one.

However, if petitioners have such interest, they have another remedy, which they have embraced. That remedy is to bring a Section 9(a) proceeding; they have done so in New York, based upon their claim of interest in the vested property. The statutory remedy is exclusive; there are not and there cannot be two concurrent remedies. On the other hand, if petitioners do not have the interest required for the commencement of a Section 9(a) proceeding, then under the consistent interpretations of the Rule they have no right to intervene here. This dilemma conclusively establishes that petitioners have no right of intervention, and their only right, if any, is through the pending Section 9(a) proceeding in New York.[11]

Petitioners also rely upon the *Missouri-Kansas* case, *supra*, as a basis for intervention. That case is not in point, respondent submits. This Court made it very clear that the foundation for intervention there was the consent decree (p. 506). The decision seems so clear that it can be well understood why the Court of Appeals found no need to discuss it as creating an applicable basis for intervention in this case.

II.

Petitioners' Intervention Is Only Ostensibly and Not Truly Derivative, Whether In a Typical or An Exceptional Sense.

None of the cases relied upon by petitioners to support their position as derivative, are in point. In every one of them, and in all others which this respondent has examined, the claim which is being asserted is a corporate one. In the case at bar, the claim is individual, as elsewhere demonstrated in this brief.

---

11 Incidentally, the Section 9(a) suit in New York draws into its control so much of the vested property as represents petitioners' proportionate interest in this respondent corporation. See 50 U. S. C. Appendix, Section 9(a). Such proportion cannot be sold as long as that suit is pending. (Ibid.)

In a typical derivative situation,[12] the plaintiff is the corporation and the shareholder intervenes, or the plaintiff is a shareholder and the corporation is a nominal defendant. The real defendant is (a) misfeasor stockholder-director-officer, or (b) debtor of the corporation, or (c) misfeasor third party. Recovery is in the name of the corporation.

In the exceptional derivative situation,[13] plaintiff is the corporation or a stockholder and the defendant (or one of the defendants) is a misfeasor stockholder-director-officer. As in the cases above, again a corporate claim is always asserted, but recovery may be had by a stockholder-plaintiff.

In either situation, the corporation is always essentially *entitled* to redress. If the court should decide that it is not essentially due to the corporation, the litigation is not successful.

As indicated above, the exceptional cases arise only where the misfeasor stockholder-director-officer is the defendant. The Attorney General or the United States do not come within this category; hence, there is no need to permit recovery by a stockholder, as in the exceptional cases, since there is no necessity to protect either the corporation or the minority stockholder from the Attorney General or the United States.

In the case at bar, the plaintiff is the corporation but the defendant is not the misfeasor stockholder-director-officer. If the Attorney General is considered as a misfeasor-third party, i.e., on the theory of conversion, he is such as to the corporation—not as to the stockholders.

In the exceptional cases, allowing recovery directly by the stockholder, recovery by the corporation is denied because misfeasor-stockholders should not participate in dis-

---

[12] E. g. *Pyle-National Co.* v. *Amos*, 172 F. 2d 428 (7th Cir), and *Park & Tilford, Inc. v. Schulte*, 160 F. 2d 984 (2nd Cir.), cited by petitioners on page 14 of their petition.

[13] This reference is intended to embrace all the cases cited in the footnote on page 16 of the petition. See, also, the note in 120 A. L. R. 238.

tribution;—not because the corporation is *legally* disqualified to recover.

In the instant situation, if the claim is not recoverable by the corporation, it would be on the theory that misfeasor ("enemy") stockholders-officers-directors-management would be the cause of failure of corporate recovery. The false analogy occurs when petitioners try to liken the "enemy" stockholders to the misfeasor-defendants—to prevent participation in distribution; but in the case at bar the "enemy" management would have a different effect—it would prevent corporate recovery; the corporation would be thereby *legally* disqualified to recover.

The foregoing demonstrates, this respondent submits, that petitioners must fail in their attempt to simulate a stockholders' derivative action, because they do not fit any known category. Their fundamental impediment is the vice which permeates their entire case—they are *in reality* asserting an individual and not a corporate claim.

III.

Petitioners Cannot Maintain a Class Action Here.

It is submitted that petitioners cannot act in a representative capacity in this case.[14] Three points must be noted in connection with a class action: (a) There must be a class; (b) the persons in the class must be so numerous as to make it impracticable to bring them all before the Court; and (c) the character of the right must be common to all members of the class. See Moore's Federal Practice, Second Edition, Volume 3, page 3415 *et seq.* See, also, *Brotherhood of Locomotive Firemen, etc.* v. *Graham*, 84 U. S. App. D. C. 67, 72, 175 F. 2d 802, reversed on other grounds, 338 U. S. 232.

Petitioners alleged in their New York action (paragraph 6) that they had duly filed a claim with the Office of Alien Property, whereas, their proposed complaint here is silent

[14] See pp. 9-10, *ante*.

in this respect. This is obviously not an oversight for the reason stated on pages 9-10, *ante*.

Section 9(a) of the Trading with Enemy Act (50 U. S. C. App. 9a) requires the submission of a claim as an absolute prerequisite to the filing and maintenance of a suit for the recovery of vested property. Only two other stockholders of the plaintiff have filed claims. (See details in affidavit of OAP official, R. 31). Under section 33 of the Trading with the Enemy Act, as amended (50 U. S. C. App. 33), it is now too late for anyone else to file a claim in respect of the property of this respondent which was vested. Petitioners filed their New York action within the statutory period.

Petitioners define the class as "non-enemy" stockholders. This Court established in the *Ueberlee* case, *supra*, the rule that a claimant under Section 9(a) must be free from "enemy taint." Whatever that term means, it involves the factual determination as to the status of a claimant. Naturally, it is not likely that any two claimants will occupy identical positions, or as elsewhere stated in this brief, every claimant must establish his own lack of "enemy taint" by evidence which will be different from that of every other claimant.

For petitioners to say that they represent a "non-enemy" class is to beg the question. As indicated above, a trial court would have to try as many separate cases as there are shareholders.

In order for a person to be entitled to bring an action on behalf of a class, the class must actually exist and the members of it must actually be similarly situated to plaintiff. See *Hansberry* v. *Lee*, 311 U. S. 32, 45; *Weeks* v. *Barco Oil Co.*, (C. C. A. 7th, 1941) 125 F. 2d 84; *Mitchell* v. *Wright*, 9 F. R. S. 23a. 11, Case 2, 62 F. Supp. 580 (D. C. M. D. Ala. 1945), reversed on other grounds, 154 F. 2d 924, cert. denied, 329 U. S. 733; *Speed* v. *Transamerica Corporation*, 5 F. R. D. 56. 9 F. R. S. 23a, 33, Case 2, (D. C. D. Del. 1945).

The result of the foregoing is as follows: (a) There is truly no class; (b) if there were, it would be limited to a maximum of three claimants; and (c) a class action may not be brought on behalf of such a *small* class. See *Atwood* v. *National Bank of Lima*, (C. C. A. 6th 1940), 115 F. 2d 961.[15]

IV.

The New York Proceeding Affords Petitioners Full Opportunity to Test Out Their Theory Under the Uebersee Case.

The civil action duly filed by the petitioners, *individually*, in New York, squarely presents what petitioners call the "Uebersee issue" and in the exact manner in which they define that "issue."

In other words, petitioners derive from this Court's observations at the end of its opinion in the *Uebersee* case the conclusion that if a corporation is ineligible to recover *all* its vested corporate property, then somehow a portion of such property may be recovered commensurate with the quantity of the interest of its "non-enemy" stockholders—not for the benefit of the corporation as a whole, but only for the "non-enemy" stockholders.

But petitioners still try to make this a corporate claim in order to maintain their present effort to intervene. We have hereinbefore demonstrated why it cannot be a corporate claim. We emphasize again that petitioners' reasoning contemplates recovery only by and for *individuals*. Moreover, how can this corporation maintain a cause of action where the peculiar status of each of its stockholders is the issue, and the status of each stockholder is different from that of every other one? Take, for example, Mr. and Mrs. Kaufman, who lay claim to eighty-six shares of stock.

---

[15] In view of what we have just concluded, it is unnecessary for us to make the additional point, which we regard as valid, that the character of the alleged right is not common to all members of the class. (See FRCP 23 (a) (1)). Compare, *Knowles* v. *War Damage Corporation*, 83 U. S. App. D. C. 388, 171 F. 2d 15, cert. denied, 336 U. S. 914.

in this respondent corporation. They, as every other claimant under the Trading with the Enemy Act, must be free from "enemy taint." What is their personal history? What were their relationships with Germany? Did they acquiesce in or ratify that which the Custodian claims to constitute "enemy taint" on the part of the corporation? These are general questions which contain many subdivisions raising the particular and peculiar status of each stockholder.[16]

Ownership of shares in respondent corporation on February 16, 1942—the date of vesting—is essential, even if all other hurdles were overcome.[17] This respondent's common shares at that time—and until December, 1945—were bearer. It is not even possible in this case to resort to corporate records to establish who owned such shares on the crucial date or dates.

Neither party to this petition can presume to know to a certainty what this Court had in mind at the end of its opinion in the *Uebersee* case. But, it is submitted, this is not the case in which to test out the matter. There are too many obstacles standing in the way before the crucial point is reached.

In sum, the petition herein (1) conflicts with the rules of intervention; (2) it does not fit any known formula for the assertion of stockholders' derivative rights; and (3) it violates the principles applicable to class actions. It asks this Court to rule, contrary to an unbroken line of its decisions, that, in the circumstances of this case, a stockholder has a distinct and severable interest in the assets of a corporation proportionate to his stock ownership; and, more-

---

[16] Petitioners argue on page 13 of their petition that their present effort avoids a "multiplicity of actions," which they recognize to be bad. Plainly, there can be no such avoidance.

[17] Referring to the affidavit of Hans Gut (R. 69), petitioners claim in footnote 2 on page 2 of their petition that "non-enemy" owners of over 11,000 shares "have formally supported petitioners in this proceeding," but the affidavit is significantly silent as to whether any of the shareholders in the Gut group were such on February 16, 1942. Gut's company is the only shareholder specifically mentioned in the affidavit, and he cannot establish ownership of his alleged twenty-five shares on that date.

over, it asks this Court so to rule in a case that is subject to the foregoing infirmities, while petitioners have pending a duly filed action of their own in which the point is squarely and clearly presented.

Petitioners are not making their own fight in the attempted intervention in the case at bar. Instead, it is crystal-clear that they are seeking redress for a class which does not exist and are using this as a pretext to enter the instant litigation.

V.

Petitioners Cannot Intervene To Prevent A Settlement Between Respondents.

This respondent submits that petitioners should not be permitted to intervene for the purpose of blocking a settlement. Certain generalities will first be mentioned.

The proposed settlement is not attacked as being the product of fraud or bad faith on the part of this respondent's management. There is no accusation of collusion between the parties. It is not urged that the main action should be prosecuted to a conclusion without abatement; nor that a settlement of anything less than 100% is not acceptable. There is and could be no charge that the proposed compromise is not the result of the exercise of fair and experienced business judgment.

The basis of petitioners' claim that they have a right to intervene in order to prevent a settlement of the litigation is the same contention elsewhere made that as "non-enemy" stockholders, they have individual proportionate rights to the assets of the corporation and that those rights should not be diminished by a ratable distribution to all stockholders, whether enemy or non-enemy. If petitioners-stockholders have no interest in the corporate property that would sustain a Section 9(a) proceeding, then they have no interest sufficient to permit them to intervene to prevent a settlement of this corporate claim. The decision in the Section 9(a) case brought by them in the Southern

District of New York will determine the question of interest and there is no place in this proceeding for its determination.

Petitioners, as stockholders, have no status to prevent a beneficial settlement by the corporation, except in case of fraud or collusion between the corporation and the other parties to the litigation. The propriety of the claimed settlement is not challenged and it cannot be challenged. And when it is remembered that this suit is, in substance, one against the United States, it is clear that petitioners are not in a position to restrain or prevent the United States from making any settlement or disposition of this litigation which the Attorney General, as its properly authorized officer, may determine to be in the public interest.

The case of *Pyle-National Co.* v. *Amos, supra,* is typical of cases of fraud and collusion between a corporation and the other parties to the litigation. In that case, a stockholder sought and was permitted to intervene in a pending suit by his corporation against former directors. He claimed that the management was not vigorously prosecuting the action, and that the parties were about to effect an inadequate compromise. But, the intervention was for the purpose of preventing a compromise that would have hurt the corporation, and not, as here, one that it is claimed would hurt a group of stockholders.

To summarize: if it should be decided that petitioners have some right, title or interest in the corporate property, they cannot be hurt by a compromise between the respondents, since their individual action would survive such a settlement; and if they have no individual proportional rights, apart from those of "enemy" stockholders, they have no basis for complaint about a compromise.

CONCLUSION.

The petition for a writ of certiorari does not, in our opinion, present any question requiring further review of this case by this Court. We therefore submit that it should be denied.

Respectfully submitted,

ROGER J. WHITEFORD
JOHN J. WILSON

Attorneys for Respondent, Societe Internationale Pour Participations Industrielles et Commerciales S.A. etc.

Address: 815 15th St., N. W.
Washington, D. C.

Of Counsel
PEIDER KONZ

August 9, 1951